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DEFINING “BREACH OF THE PEACE” IN SELF-HELP REPOSSESSIONS

Ryan McRobert

Abstract: Since Roman times, creditors have invoked the limited extrajudicial remedy of self-help repossession. Pre-colonial English laws also allowed for a limited repossession remedy outside of the courts, provided the creditor accomplished the repossession without a “breach of the peace.” The Uniform Commercial Code (UCC) has allowed for the self-help remedy since the 1950s, making it available for any secured party in the event of contractual default so long as there was no breach of the peace. The drafters of the UCC, however, failed to define what constituted a “breach of the peace,” choosing to allow the courts to flesh out the definition in a fact specific, ex post fashion. This has resulted in a lack of clarity and consistency across jurisdictions as each court attempts to craft a breach of the peace requirement without guidance from the UCC. This Comment argues that courts across the country should adopt a two-part test for determining whether a breach of the peace occurred during self-help repossession. The two-part test involves three per se rules of exclusion followed by consideration of two factors to reach a final decision.

INTRODUCTION

The concept of self-help repossession has existed in law and society since Roman times.¹ Repossession is “[t]he act or an instance of retaking property”² and self-help is “[a]n attempt to redress a perceived wrong by one’s own action rather than through the normal legal process.”³ Throughout history, this concept has allowed individuals to regain possession of their rightful and legal property without resorting to a formal judicial process. Appearing in the Roman Empire,⁴ the concept evolved over time as it progressed through other societies,⁵ into English law,⁶ and then finally into the common law of the United States.⁷ Congress first recognized the self-help repossession remedy in the

1. 3 THOMAS ATKINS STREET, FOUNDATIONS OF LEGAL LIABILITY - A PRESENTATION OF THE THEORY AND DEVELOPMENT OF THE COMMON LAW 280–81 (1906).

2. BLACK’S LAW DICTIONARY 1327 (8th ed. 2004).

3. *Id.* at 1391.

4. *See generally* STREET, *supra* note 1.

5. *Id.* at 282–88.

6. 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 575–76 (2d ed. 1898).

7. *Prigg v. Pennsylvania*, 41 U.S. 539, 613 (1842).

Uniform Conditional Sales Act,⁸ and it is presently codified in section 9-609 of the Uniform Commercial Code (UCC).⁹

The UCC established a very formal process for self-help repossession. Only secured parties have the option of self-help repossession.¹⁰ In order to become secured, the party must form a security interest.¹¹ Only then does the debtor¹² have a specified obligation, as defined by the security interest, to the secured party.¹³ If debtor default¹⁴ occurs, then the secured party has certain rights to the collateral,¹⁵ which could be in the debtor's possession.¹⁶ One of the secured party's rights is self-help repossession. Section 9-609 of the UCC states that "[a]fter default, a secured party . . . may take possession of the collateral . . . pursuant to judicial process; or . . . without judicial process, if it proceeds without breach of the peace."¹⁷

This Comment focuses on the difficulty courts have in defining the term "breach of the peace" within the meaning of the UCC. For example, if a repossession agent asks the police to provide him with protection as he repossesses a vehicle, is this a breach of the peace that makes the self-help repossession unlawful? Does a breach of the peace occur when a homeowner assaults someone trespassing on his property in an effort to repossess lawn furniture? Imagine that the same homeowner does not notice his property being repossessed, but the creditor has to cut a lock and bypass a gate to repossess the property.

8. UNIF. CONDITIONAL SALES ACT § 16, 2 U.L.A. 27 (1922) (creating standardized rules and regulations for the sale and lease of goods).

9. U.C.C. § 9-609 (1999).

10. *Id.* The UCC defines a "secured party" as "a person in whose favor a security interest is created or provided for under a security agreement, whether or not any obligation to be secured is outstanding . . ." U.C.C. § 9-102(72) (1999).

11. "Security interest" is defined as "an interest in personal property or fixtures which secures payment or performance of an obligation . . ." U.C.C. § 1-201(37) (1999). A security interest is created when the following three requirements are met: (1) value has been given; (2) the debtor has rights in the collateral; and (3) the collateral is either in possession of the third party or the debtor has authenticated a security agreement that provides a description of the collateral. U.C.C. § 9-203 (1999).

12. "Debtor" is defined as "[o]ne who owes an obligation to another, esp[ecially] an obligation to pay money." BLACK'S LAW DICTIONARY 433 (8th ed. 2004).

13. U.C.C. § 9-203 (1999).

14. "Default" is defined as "[t]he omission or failure to perform a legal or contractual duty; esp[ecially], the failure to pay a debt when due." BLACK'S LAW DICTIONARY 449 (8th ed. 2004).

15. "Collateral" is defined as "the property subject to a security interest," including "proceeds to which a security interest attaches . . ." U.C.C. § 9-102(12) (2004).

16. U.C.C. § 9-609 (1999).

17. *Id.*

Does this breach the peace even if there is no confrontation? What if the debtor experiences emotional distress or something happens to a neutral third party? *Chapa v. Traciers & Associates*¹⁸ illustrates the difficulty courts face in defining and applying the “breach of the peace” concept. In that case, a repossession agent performed a self-help repossession and towed the debtor’s vehicle away while—unbeknownst to the agent—the debtor’s children were still inside.¹⁹ The court decided that the agent’s actions did not constitute a breach of the peace,²⁰ even though the debtor likely experienced extreme emotional distress from thinking that her children had been abducted. As *Chapa* illustrates, the lack of a clear definition for “breach of the peace” in the self-help repossession context has left parties without a remedy in the face of significant emotional, physical, or financial harm caused by a repossessing creditor. It has also produced harmful uncertainty for creditors, who are unable to determine the scope of their repossession rights *ex ante*.

Part I of this Comment traces the history of self-help repossession from its origins in the Roman Empire through its eventual codification in the UCC. Part II explains how courts treat breach of the peace claims inconsistently, demonstrating the need for uniformity across jurisdictions. It also discusses how the UCC’s *ex post* enforcement approach failed to anticipate certain modern day economic conditions that require a universal approach to breach of the peace review.²¹ Part III recommends that all states adopt a two-part test to define “breach of the peace,” considering the goals of self-help repossession while effectively balancing the rights of the debtor, the secured party, and the public at large.

I. BEFORE CODIFICATION IN THE UCC, SELF-HELP REPOSSESSION RETAINED ITS ESSENTIAL CHARACTER AS AN EXTRAJUDICIAL REMEDY AVAILABLE TO LIMITED GROUPS OF PEOPLE

Self-help repossession has existed in some form since the creation of the debtor-creditor concept, which prompted an “injured person to take from the wrongdoer . . . whatever is seizable and transportable.”²² When

18. 267 S.W.3d 386 (Tex. Ct. App. 2008).

19. *Id.* at 389.

20. *Id.* at 395–96.

21. “Ex post” is defined as “[b]ased on knowledge and fact; viewed after the fact, in hindsight; objective; retrospective.” BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

22. See STREET, *supra* note 1, at 279.

bartering was the sole method of immediate exchange, there was no need for repossession because payment was made in full upon exchange of goods. However, as the debtor–creditor relationship developed, self-help repossession became an efficient remedy for delinquency.²³ As economies developed and technology improved, the concept and execution of self-help repossession remained relatively unchanged.²⁴ Societies also continued to regulate how and when this extrajudicial right could be implemented.²⁵ This pattern continues to the present day: the drafters of the UCC adopted and endorsed self-help repossession as an efficient extrajudicial tool, but failed to provide a precise definition that indicates the lawful scope of the remedy.²⁶

A. *Self-Help Repossession Has Existed Since the Roman Empire and Was Incorporated into English Common Law*

The concept of self-help repossession can be traced to the Roman legal concept of “distress,” which was the practice of “taking [a] personal chattel without legal process from the possession of a wrongdoer into the hands of the party aggrieved, as a pledge for the redress of an injury, the performance of a duty, or the satisfaction of a demand.”²⁷ Referred to in Roman law as *pignoris capio*, it differed from other legal remedies because of its extrajudicial nature.²⁸ This extrajudicial right could, however, only be exercised in a few specific situations.²⁹ For example, the remedy was available to enforce payment for animals or for animal sacrifices when payment was not properly made.³⁰ The property seized satisfied the claim and provided a complete remedy.³¹

The Teutonic people of the Middle Ages³² also utilized self-help

23. See *infra* notes 27–31 and accompanying text.

24. See *infra* notes 32–53 and accompanying text.

25. *Id.*

26. See *infra* Part I.C.

27. STREET, *supra* note 1, at 278 (quoting JAMES BRADBY, A TREATISE ON THE LAW OF DISTRESSES 1 (Philadelphia, J.S. Littell, 2d ed. 1833)).

28. *Id.* at 280.

29. *Id.* at 280–81.

30. *Id.* at 281.

31. *Id.*

32. “Teuton” is defined as “a member of an ancient [probably] Germanic or Celtic people . . . a member of one of the peoples speaking a language of the Germanic branch of the Indo-European family of languages.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2365 (3d ed. 2002).

repossession, but only with limited procedures.³³ Though a party could pursue the remedy without recourse to the courts, formal procedural requirements applied.³⁴ The process required three witnesses to accompany the creditor to the debtor's home, at which point the creditor would make a formal demand for repayment.³⁵ The demand had to include a description of both the property that was to be repossessed and the property's value.³⁶ If the debtor refused to fulfill the demand, then the creditor was forced to pursue a remedy in the courts.³⁷

Pre-colonial English law had similarly strict rules governing when a self-help repossession could take place, what items could be repossessed, and the manner of taking and disposing of these items.³⁸ Early English law opposed self-help remedies altogether, viewing them as "an enemy of law, a contempt of the king and his court."³⁹ Even self-defense was disfavored as a form of self-help remedy.⁴⁰ As the Middle Ages progressed, however, English opposition to self-help remedies relaxed, though such remedies remained subject to restrictive rules and regulations.⁴¹ For example, the distress remedy was only available for non-payment of rent and destruction of property by someone else's animals.⁴² Additionally, only personal chattels could be recovered as a distress remedy, and the performance of distress had to take place during the daytime, with very few exceptions.⁴³ Interestingly, the English permitted third-party assistance in performing the repossession and also gave the creditor a right of action for items that had been fraudulently removed from the debtor's property in anticipation of the distress action.⁴⁴ The cause of action for fraudulent removal applied not only against the debtor, but also to "all persons privy to, or assisting in, such

33. STREET, *supra* note 1, at 282–83.

34. *Id.*

35. *Id.* at 282.

36. *Id.*

37. *Id.*

38. 2 POLLOCK & MAITLAND, *supra* note 6, at 574–77.

39. *Id.* at 574.

40. *Id.*

41. *Id.* at 576–78.

42. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 6 (Thomas M. Cooley ed. vol. 2 1871) ("[W]here a man finds beasts of a stranger wandering in his grounds . . . doing him hurt or damage . . . in which case the owner of the soil may detain them, till satisfaction be made him for the injury he has thereby sustained.").

43. *Id.* at 11.

44. *Id.*

fraudulent conveyance, forfeit double the value to the landlord.”⁴⁵

B. Self-Help Repossession Was First Recognized by the U.S. Courts in the Nineteenth Century and Codified in the Early Twentieth Century

The U.S. Supreme Court first addressed self-help repossession in 1842.⁴⁶ *Prigg v. Pennsylvania*⁴⁷ concerned repossession of a slave who had escaped from Maryland and crossed into Pennsylvania.⁴⁸ In deciding that the slave owner was allowed to pursue and retake his property, the Court applied English self-help principles, including breach of the peace.⁴⁹ Quoting Blackstone, the Court explained that “the owner of the goods, and the husband, parent or master, may lawfully claim and retake them, wherever he happens to find them, so it be not in a riotous manner, or attended with a breach of the peace.”⁵⁰ Applying this rule to the facts of *Prigg*, the Court held, “[T]he owner of a slave is clothed with entire authority, in every state in the Union, to seize and recapture his slave, whenever he can do it, without any breach of the peace or any illegal violence.”⁵¹ *Prigg* appears to be the first time that “breach of the peace” was used in the United States to describe the lawful bounds of repossession. Aside from *Prigg*, most of the early American cases addressing self-help repossession involved enforcement of contracts, which expressly provided for the self-help remedy in the event of a breach.⁵² Other cases, however, identified a right of repossession within a sales contract without an express provision.⁵³

The remedy of self-help repossession was codified in the Uniform Conditional Sales Act of 1918 (UCSA), a predecessor to the UCC.⁵⁴ The UCSA incorporated the two central precepts of the common law remedy: (1) when a buyer is in default of payment, “the seller may retake possession;” and, (2) “[u]nless the goods can be retaken without breach

45. *Id.*

46. *Prigg v. Pennsylvania*, 41 U.S. 539, 613 (1842).

47. 41 U.S. 539 (1842).

48. *Id.* at 539.

49. *Id.* at 613.

50. *Id.* (quoting 2 BLACKSTONE, *supra* note 42, at 4).

51. *Id.*

52. *See, e.g.*, *Wilmerding v. Rhodes-Haverty Furniture Co.*, 50 S.E. 100 (Ga. 1905); *Swain v. Schild*, 117 N.E. 933 (Ind. App. 1907); *Flaherty v. Ginsburg*, 110 N.W. 1050 (Iowa 1907).

53. *See, e.g.*, *Blackford v. Neaves*, 205 P. 587 (Ariz. 1922); *C.I.T. Corp. v. Reeves*, 150 So. 638 (Fla. 1933); *Westerman v. Or. Auto. Credit Corp.*, 122 P.2d 435, 439 (Or. 1942).

54. UNIF. CONDITIONAL SALES ACT § 16, 2 U.L.A. 27 (1922).

of the peace, they shall be retaken by legal process.”⁵⁵

C. The Uniform Commercial Code Provides a Self-Help Remedy to Any Secured Party

The UCC emerged from a joint project of the National Conference of Commissioners on Uniform State Laws (NCC) and the American Law Institute (ALI).⁵⁶ Pennsylvania was the first state to adopt the UCC in 1954, and Louisiana remains the only state not to adopt the UCC in its entirety.⁵⁷ UCC revisions are made periodically, with the most recent revision occurring in 2003.⁵⁸ The UCC’s Chief Reporter, Karl Llewellyn, stated that the drafters of Article 9⁵⁹—which includes the self-help repossession provision—sought to change the law of personal property in order to establish greater simplicity, fairness, and uniformity.⁶⁰

Section 9-503 was the UCC’s original statutory expression of self-help repossession.⁶¹ The drafters of the UCC intended to build upon the prior codification of self-help repossession found in the Uniform Trust Receipts Act and the UCSA.⁶² Accordingly, section 9-503 stated: “Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.”⁶³ The official comments to this section do not define “breach of the peace.”⁶⁴ Nevertheless, the UCC took the step of allowing self-help repossession of any collateral by any

55. *Id.*

56. Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code: 1940-1949*, 51 SMU L. REV. 275, 276 (1998).

57. *Uniform Commercial Code; UCC*, ENCYCLOPEDIA OF CREDIT, <http://www.encyclopediaofcredit.com/Uniform-Commercial-Code> (last visited Mar. 8, 2012).

58. *Past and Present ALI Projects*, AMERICAN LAW INSTITUTE (Apr. 2010), http://www.ali.org/doc/past_present_ALIprojects.pdf.

59. Article 9 of the UCC deals exclusively with secured transactions. Section 9-109 states that this Article applies to “a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract.” U.C.C. § 9-109 (1999).

60. Karl N. Llewellyn, *Problems of Codifying Security Law*, 13 LAW & CONTEMP. PROBS. 687 (1948).

61. U.C.C. § 9-503 (1972).

62. *Id.* § 9-503 cmt. (“This Article follows the provisions of the earlier uniform legislation in allowing the secured party in most cases to take possession without the issuance of judicial process.”).

63. *Id.* § 9-503.

64. *Id.* § 9-503 cmt.

secured creditor.⁶⁵ This was a monumental break with the long history of self-help repossession as a limited remedy.⁶⁶ Having been adopted by forty-nine states,⁶⁷ the UCC created a self-help remedy that is currently available to masses of secured creditors.

Section 9-609 of the UCC is the current expression of self-help repossession approved by the drafters in 1999. Section 9-609 states that “[a]fter default, a secured party: (1) may take possession of the collateral; and (2) without removal, may render equipment unusable . . . (1) pursuant to judicial process; or (2) without judicial process, if it proceeds without breach of the peace.”⁶⁸ Although little changed from the text of former section 9-503, there are some important differences between the two provisions. First, section 9-609 explicitly subjects the disabling of equipment⁶⁹ to the breach of the peace requirement.⁷⁰ Former section 9-503 only addressed this scenario in the commentary and it was unclear whether the breach of the peace requirement applied.⁷¹ Section 9-609 makes clear that this requirement extends beyond literal repossession to disabling equipment as well.⁷²

The second important change appears in the official commentary. Comment 3 to section 9-609 addresses the meaning of breach of the peace and gives some guidance for courts.⁷³ The drafters of the current UCC avoided creating specific guidelines for what constitutes breach of the peace, except to say that (1) courts should hold secured parties liable for breaches created by third parties when done on their behalf, and (2)

65. *Id.* § 9-503.

66. *See supra* Part I.A.

67. *See supra* note 57 and accompanying text.

68. U.C.C. § 9-609 (1999).

69. *Id.* While this addition to the UCC is not relevant to this Comment, it does show that the drafters took the time to specify what actions were subject to the “breach of the peace” requirement, while at the same time not defining what constitutes a breach. Disabling of equipment may occur in the case of collateral such as heavy equipment, when the physical removal from the debtor’s property and storage pending resale may be very expensive and impracticable. U.C.C. § 9-503 cmt. (1972).

70. *Id.*

71. *Id.*

72. U.C.C. § 9-609 (1999).

73. *Id.* § 9-609 cmt. 3 (“Subsection (b) permits a secured party to proceed under this section without judicial process if it does so ‘without breach of the peace’ Like former Section 9-503, this section does not define or explain the conduct that will constitute a breach of the peace, leaving that matter for continuing development by the courts [C]ourts should hold the secured party responsible for the actions of others taken on the secured party’s behalf, including independent contractors engaged by the secured party to take possession of collateral. This section does not authorize a secured party who repossesses without judicial process to utilize the assistance of a law-enforcement officer.”).

secured parties are not permitted to use the assistance of law enforcement personnel to accomplish a self-help repossession.⁷⁴ However, these articulated limits only aid in statutory interpretation and are not binding.⁷⁵ By relegating these details to the commentary, the UCC drafters avoided creating binding statutory guidelines for breach of the peace issues,⁷⁶ thereby deferring to the judiciary. Therefore, in order to determine the current standard for breach of the peace, one must look to judicial decisions and their respective interpretations of “breach of the peace.”

D. In Breaking with the Common Law and Making Self-Help Repossession Available to the Masses, the Drafters of the UCC Failed to Anticipate the Future of Commercial Transactions, Leading to an Ex Post Approach for Enforcement

Historically, self-help repossession was limited to certain classes of people⁷⁷ or very specific situations.⁷⁸ The UCC broke from this common law tradition by abandoning the historical limits on the availability of self-help repossession and making the remedy available to any creditor upon default.⁷⁹

As they expanded the availability of the self-help repossession remedy, the UCC drafters failed to articulate the lawful scope of the remedy by defining “breach of the peace.”⁸⁰ This omission has become increasingly problematic as consumer debt⁸¹ and the number of repossessions has increased dramatically, showcased by the number of repossessed vehicles alone approaching nearly two million annually.⁸² In

74. *Id.*

75. *See, e.g.,* *Pride Hyundai, Inc. v. Chrysler Fin. Co.*, 369 F.3d 603, 613 (1st Cir. 2004); *Smith v. First Union Nat’l Bank of Tenn.*, 958 S.W.2d 113, 116 (Tenn. Ct. App. 1997).

76. U.C.C. § 9-609 cmt. 3.

77. *See supra* Part I.A.

78. *See supra* Part I.A.

79. U.C.C. § 9-609.

80. *Id.*

81. *Consumer Credit – G.19*, BD. GOVERNORS FED. RESERVE SYS., http://www.federalreserve.gov/releases/g19/hist/cc_hist_sa.html (last visited Mar. 9, 2012) (Total outstanding consumer credit in January 1950 was \$19,050,870,000. Total outstanding consumer credit in December 2010 was \$2,408,335,190,000.).

82. *See* JOHN W. VAN ALST & RICK JURGENS, NAT’L CONSUMER LAW CTR., *REPO MADNESS – HOW AUTOMOBILE REPOSSESSIONS ENDANGER OWNERS, AGENTS AND THE PUBLIC 1* (2010), available at http://www.nclc.org/images/pdf/special_projects/auto/report-repo-madness.pdf; *see also* Table 1-11: *Number of U.S. Aircraft, Vehicles, Vessels, and Other Conveyances*, RES. & INNOVATIVE TECH. ADMIN. BUREAU TRANSP. STAT.,

choosing not to define “breach of the peace,” the drafters failed to provide guidance for debtors, creditors, and the courts, instead leaving the judiciary to fill in the meaning of the term.⁸³

This has created an ex post approach under which courts must define “breach of the peace” on a case-by-case basis. A limited ex post approach to breach of the peace made sense at the time of the UCC’s drafting. Even though the remedy was made available to the general public, consumer debt was only a small fraction of what it is today.⁸⁴ Much less consumer debt translated to fewer security interests and potential repossessions. It was logical to think that courts would rarely see these cases and would have the time to slowly flesh out consistent case law that could be universally applied. In the contemporary economy, however, the number of self-help repossession cases has exploded,⁸⁵ leading to uncertainty in business and inconsistency in the courts.

II. STATE AND FEDERAL COURTS ACROSS THE COUNTRY HAVE ADOPTED DISTINCT INTERPRETATIONS OF “BREACH OF THE PEACE”

Due to the UCC drafters’ failure to define “breach of the peace,”⁸⁶ state courts across the country have created varying rules for self-help enforcement and federal courts have inconsistently interpreted state laws.⁸⁷ A few jurisdictions adopted a balancing test applicable to all “breach of the peace” cases.⁸⁸ The majority of jurisdictions, however, use a case-by-case approach to determine whether a breach has occurred based on the specific factual circumstances.⁸⁹

http://www.bts.gov/publications/national_transportation_statistics/html/table_01_11.html (last visited Mar. 9, 2012) (As a point of comparison showing that in 1960 there were 74.4 million registered vehicles in the United States and in 2009 there were 254.2 million registered vehicles in the United States.).

83. 1 BARKLEY CLARK, *THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE* 4–82 (1993).

84. *See supra* note 81 and accompanying text.

85. *See supra* note 82 and accompanying text.

86. U.C.C. § 9-609 (1999).

87. *See infra* Part II.A–B.

88. *See infra* Part II.A.

89. *See infra* Part II.B.

A. *Several Jurisdictions Have Adopted a Five-Factor Balancing Test in an Effort to Promote Consistent Interpretation of “Breach of the Peace”*

Some jurisdictions have adopted a balancing test for determining whether a “breach of the peace” occurred in the course of self-help repossession.⁹⁰ The balancing test generally considers five factors: 1) where the repossession took place; 2) the debtor’s express or constructive consent; 3) the reactions of third parties; 4) the type of premises entered; and 5) the creditors’ use of deception.⁹¹ North Carolina and the U.S. Court of Appeals for the Eighth Circuit appear to weigh the factors equally, but do not specify how many factors must be satisfied to constitute a breach of the peace.⁹² Tennessee, on the other hand, appeared to adopt the test in *Davenport v. Chrysler Credit Corp.*,⁹³ but did not balance the factors in its decision, focusing solely on the type of premises entered.⁹⁴ Some commentators suggest that the balancing approach gives a court (and jury) the ability to analyze a case’s particular facts under a consistent, objective framework, rather than an inconsistent, subjective perspective.⁹⁵ Nevertheless, the few jurisdictions that have adopted this approach have applied it in a somewhat varying manner.

B. *The Majority of Jurisdictions Use a Fact-Specific Inquiry to Identify a Breach of the Peace*

The large majority of jurisdictions do not employ a formal balancing

90. See, e.g., *Clarín v. Minn. Repossessors*, 198 F.3d 661, 664 (8th Cir. 1999); *Giles v. First Va. Credit Serv.*, 560 S.E.2d 557, 565 (N.C. Ct. App. 2002); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991).

91. This balancing test first appeared in a secondary source, to be used for guidance. See 2 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 575–82 (3d ed. 1988) (not listing the factors specifically, but discussing each of them). It has since been adopted by North Carolina, Tennessee, and the Eighth Circuit Court of Appeals. See *supra* note 90 and accompanying text.

92. See *Giles*, 560 S.E.2d at 565–66 (weighing all five factors and finding that all of them favor the repossessing party); see also *Clarín*, 198 F.3d at 664 (same).

93. 818 S.W.2d 23, 29 (Tenn. Ct. App. 1991).

94. *Davenport*, 818 S.W.2d at 29–30 (the court introduces the factors, but does not perform the balancing test, finding that a breach occurred because the repossessing party broke a lock to enter the premises).

95. See, e.g., *Giles*, 560 S.E.2d at 565–66 (“[W]e do not agree with the plaintiffs that every repossession should be analyzed subjectively We therefore adopt a balancing test using the five factors discussed above to determine whether a breach of the peace occurs when there is no confrontation.”).

test for breach of the peace.⁹⁶ Instead, they engage in fact-specific inquiries for each case.⁹⁷ Courts adopting a balancing test explicitly state factors as exclusive for determining whether a breach has occurred in future cases.⁹⁸ By contrast, as will be shown throughout this Part, courts using a fact-based model analyze each case individually, creating new factors and rules based on facts specific to each case, which fails to give adequate guidance for future determination of breach of the peace. While court decisions vary, many courts consistently consider the following factors for breach of the peace determination: the use of law enforcement, violence or threats of violence, trespass, verbal confrontation, and disturbance to third parties.⁹⁹

i. Courts Are Divided as to Whether Using Law Enforcement in Self-Help Repossession Automatically Constitutes a Breach of the Peace

Comment 3 to UCC section 9-609 indicates that the use of law enforcement to effect a self-help repossession constitutes a breach of the peace.¹⁰⁰ However, the UCC comments are not binding, but are used as an aid in statutory interpretation.¹⁰¹ In their interpretation and application of section 9-609, courts vary as to the weight they give to Comment 3's prohibition against using law enforcement in self-help repossession.¹⁰²

There are two ways in which creditors rely on law enforcement to effect a self-help repossession, which courts treat differently with regard to the "breach of the peace" analysis: the officer may help with the repossession itself,¹⁰³ or the officer's mere presence may provide passive protection for the creditor and deter potential violence.¹⁰⁴ Courts consistently hold that officer assistance with the repossession constitutes a breach of the peace.¹⁰⁵ In *Stone Machinery Co. v. Kessler*,¹⁰⁶ the

96. See *infra* Part II.B.i–v.

97. *Id.*

98. See *supra* Part II.A.

99. See *infra* Part II.B.i–v.

100. See U.C.C. § 9-609 cmt. 3 (1999).

101. See *supra* note 74 and accompanying text.

102. See *infra* notes 101–12 and accompanying text.

103. See, e.g., *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981) (explaining that the officer came between the parties and told the debtor that if he "interfered any further or in any way" that he "was going straight to jail").

104. See, e.g., *Walker v. Walthall*, 588 P.2d 863, 865 (Ariz. Ct. App. 1978).

105. See, e.g., *Harris*, 664 F.2d at 1127; *Jackson v. Richards*, 433 A.2d 888, 895–96, n.11 (Pa. Super. Ct. 1981); *Stone Mach. Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970).

Washington State Court of Appeals held that even an officer's verbal assistance "amounted to constructive force, intimidation and oppression constituting breach of the peace."¹⁰⁷ In that case, the court held that even though the officer only participated in the repossession in a verbal manner, telling the debtor, "We come over to pick up this tractor,"¹⁰⁸ the officer became a participant in the repossession.¹⁰⁹ The fact that the officer did not physically participate in the repossession was irrelevant.¹¹⁰

In contrast to the bright-line rule regarding officer participation, courts vary regarding whether the mere presence of law enforcement personnel constitutes a breach of the peace. The Arizona Court of Appeals held in *Walker v. Walthall*¹¹¹ that the mere presence of a uniformed deputy sheriff at the site of repossession constituted a breach of the peace.¹¹² The U.S. Court of Appeals for the Sixth Circuit, applying Michigan law, adopted a similar standard in *United States v. Coleman*,¹¹³ but declined to extend it to mere officer surveillance.¹¹⁴ In *Coleman*, the police officer remained around the corner from the location of the repossession and out of sight.¹¹⁵ The Sixth Circuit agreed with the logic and ruling of the *Walker* court, but found that the police officer's role was one of passive surveillance instead of presence or participation.¹¹⁶ The Ninth Circuit, however, disagreed with the *Walker* court, finding that "mere acquiescence by the police to 'stand by in case of trouble'" was permitted during repossession.¹¹⁷

ii. *Courts Consistently View Violence or Threats of Violence as a Breach of the Peace*

No reported case has held that an act of violence was not a breach of the peace in the context of self-help repossession. Although all courts

106. 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. 588 P.2d 863 (Ariz. 1978).

112. *Id.* at 865.

113. 628 F.2d 961 (6th Cir. 1980).

114. *Id.* at 964.

115. *Id.* at 963.

116. *Id.* at 964 n.1.

117. *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981).

recognize actual violence as an automatic breach of the peace, courts disagree on their analysis when there is only a *threat* of violence. The Arkansas Supreme Court held that a breach occurs when “force, or threats of force, or risk of invoking violence, accompanie[s] the repossession.”¹¹⁸ Additionally, Tennessee has stated that a breach of the peace “must involve some violence or threat of violence.”¹¹⁹ Not all threats are sufficient, however; Wyoming requires that violence must be reasonably likely and not a remote possibility for a threat to constitute a breach of the peace.¹²⁰ As shown below, many courts have a lower threshold, finding a breach of peace even without actual violence or a threat of violence.

iii. *Courts Are Inconsistent in Their Treatment of Trespass as a Breach of the Peace*

Trespass cases are widely litigated, covering a large spectrum of unique fact patterns. This has led to divergent holdings. Courts assessing whether a creditor’s trespass during self-help repossession constituted a breach of the peace consider many factors, including: (1) proximity to the debtor’s household (e.g., whether the creditor trespassed inside or outside the home, in the yard, or driveway),¹²¹ and (2) efforts by the debtor to protect the repossessed property (e.g., closed doors, locks, and signs).¹²²

Generally, the creditor may not enter the debtor’s home without permission.¹²³ In jurisdictions that have addressed this issue directly, courts agree that the home is sacred and a breach of the peace occurs anytime someone enters without permission.¹²⁴ This is consistent with the general stance in American law that the home is a protected space, from which the homeowner is generally entitled to exclude third

118. *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979).

119. *McCall v. Owens*, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991).

120. *Salisbury Livestock Co. v. Colo. Cent. Credit Union*, 793 P.2d 470, 474 n.3 (1990). The court does not go any further in defining “reasonably likely” other than to contrast it with a “remote possibility.”

121. See *infra* notes 120–27 and accompanying text.

122. See *infra* notes 128–30 and accompanying text.

123. See, e.g., *Evers-Jordan Furniture Co. v. Hartzog*, 187 So. 491, 493 (Ala. 1939); *Girard v. Anderson*, 257 N.W. 400, 402–03 (Iowa 1934) (finding that repossession of a piano through forcible entry of a debtor’s residence constitutes a breach of the peace even though the repossessing party claimed that the door was unlocked); *Hileman v. Harter Bank & Trust Co.*, 186 N.E.2d 853, 855 (Ohio 1962).

124. See *Hartzog*, 187 So. at 493; *Girard*, 257 N.W. at 402–03; *Hileman*, 186 N.E. 2d at 855.

parties.¹²⁵ This tradition, coupled with the desire that self-help repossession occur without violence,¹²⁶ has led courts to conclude that trespass inside the debtor's home automatically constitutes a breach of the peace.

As the creditor retreats from the residence of the debtor and into the driveway, yard, or street, the debtor's ability to claim an automatic breach of the peace becomes more difficult.¹²⁷ No reported decision has held that mere trespass onto the debtor's property without entering the home constitutes a breach of the peace.¹²⁸ Instead, courts have held that such trespasses are a necessary part of lawful repossessions.¹²⁹

However, the cases are inconsistent when the creditor does not trespass into the debtor's home but does disregard express measures taken by the debtor to protect his property. Courts generally hold that a creditor who breaks a lock or chain to enter the property of a debtor is guilty of breaching the peace.¹³⁰ However, a line of cases from New York hold that a breach of the peace does not occur when a creditor enters through a locked door by using a key obtained without authorization or by cutting locks.¹³¹ Though there is little case law considering a creditor's disregard of a debtor's "No Trespassing" sign, one reported case on point held that such action does not itself constitute a breach of the peace.¹³²

125. See generally, Annotation, *Homicide: Duty to Retreat Where Assailant Is Social Guest on Premises*, 100 A.L.R.3d 532 (1980).

126. See *supra* Part II.B.ii.

127. See WHITE, *supra* note 91, at 577.

128. See, e.g., *Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 570 (5th Cir. 1987) (secured creditor making unauthorized entry onto driveway of debtor's residence to remove vehicle is not breach of the peace); *Hester v. Bandy*, 627 So.2d 833, 840 (Miss. 1993) ("[S]imply going upon the private driveway of the debtor and taking possession of secured collateral, without more, does not constitute a breach of the peace."); *Ragde v. Peoples Bank*, 53 Wash. App. 173, 176–77, 767 P.2d 949, 951 (1989) (repossession of car from driveway at 5:00 a.m. was not breach of the peace).

129. See *Butler*, 829 F.2d at 570; *Hester*, 627 So.2d at 840; *Ragde*, 53 Wash. App. at 176–77, 767 P.2d at 951.

130. See, e.g., *Martin v. Dorn Equip. Co.* 821 P.2d 1025, 1026–28 (Mont. 1991) (cutting chains connected to a lock is a breach of the peace); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 859, 862 (Okla. 1998) (cutting gate's chain without permission is a breach of the peace); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 26, 29–30 (Tenn. Ct. App. 1991) (entering garage and cutting chains that attached car to post in garage to repossess the car is a breach of the peace).

131. See, e.g., *Global Casting Indus., Inc. v. Daley-Hodkin Corp.*, 432 N.Y.S.2d 453, 456 (N.Y. Sup. Ct. 1980); *Cherno v. Bank of Babylon*, 282 N.Y.S.2d 114, 120 (N.Y. Sup. Ct. 1967), *aff'd*, 288 N.Y.S.2d 862 (N.Y. App. Div. 1968).

132. See *Chrysler Fin. Co. v. Flynn*, 88 S.W.3d 142, 147–52 (Mo. Ct. App. 2002).

iv. *Courts Are Inconsistent in Their Treatment of Verbal Confrontations During Self-Help Repossession*

Courts are divided regarding the legal effect of a debtor's verbal objections to self-help repossession. Some courts have held that a debtor's verbal objection, however minor, makes any seizure a breach of the peace.¹³³ Other courts require a somewhat higher level of protest, requiring an "unequivocal oral protest"¹³⁴ or "repossession in the face of the debtor's objection."¹³⁵

Courts that allow repossession to occur after a verbal objection do so only if the nature of the objection suggests that it is not likely to lead to a physical confrontation. The Fifth District Appellate Court of Illinois found that no breach of the peace occurred when the debtor yelled, "Don't take it," to a secured creditor attempting to repossess his car.¹³⁶ Defining "breach of the peace" as "conduct which incites or is likely to incite immediate public turbulence,"¹³⁷ the court found no violation of the self-help repossession doctrine because the reposessor made no physical or verbal response to the debtor's request and the debtor elected not to act in a violent manner.¹³⁸ Using similar reasoning, the U.S. Court of Appeals for the Eighth Circuit found no breach of the peace when a creditor completed the repossession after the debtor interrupted but allowed the debtor to recover his personal items before seizing the vehicle.¹³⁹ The court supported the district judge's reasoning that the repossession was accomplished without the risk of violence because "[t]he evidence does not reveal that [the repossessing creditors] performed any act which was oppressive, threatening or tended to cause physical violence."¹⁴⁰ Finally, the Supreme Court of Arkansas ignored a potential verbal objection by holding that there was no breach of the peace when a secured creditor continued repossession of a vehicle after the debtor told him, "Well, I wish you wouldn't but I'm not going to do

133. See, e.g., *Marcus v. McCollum*, 394 F.3d 813, 820 (10th Cir. 2004) (applying Oklahoma law, the court determined that any debtor's request for secured creditor to stop constitutes breach of the peace); *Hollibush v. Ford Motor Credit Co.*, 508 N.W.2d 449, 451-53 (Wis. Ct. App. 1993) (holding creditor repossessing debtor's automobile constituted a breach of the peace where debtor protested to repossessing agent, "You are not going to take the Bronco").

134. See *Dixon v. Ford Motor Credit Co.*, 391 N.E.2d 493, 497 (Ill. Ct. App. 1979).

135. See *First & Farmers Bank, Inc. v. Henderson*, 763 S.W.2d 137, 140 (Ky. Ct. App. 1988).

136. *Chrysler Credit Corp. v. Koontz*, 661 N.E.2d 1171, 1173-74 (Ill. Ct. App. 1996).

137. *Id.* at 1173.

138. *Id.* at 1174.

139. *Williams v. Ford Motor Credit Co.*, 674 F.2d 717, 720 (8th Cir. 1982).

140. *Id.* at 719.

anything to stop you.”¹⁴¹ According to these courts, if the debtor objects to the repossession, a breach of the peace will occur if the creditor continues the repossession despite a likelihood of violence. If the creditor does not continue the repossession where there is a likelihood of violence, there is no breach of the peace regardless of whether there has been a verbal objection by the debtor.

v. *Courts Have Not Recognized Disturbances to Third Parties as Breaches of the Peace*

Some courts believe that disturbances to third parties do not constitute a breach of the peace. The 2008 case of *Chapa v. Tracier & Associates* provides one of the most outlandish examples of a court’s refusal to recognize harm to third parties as a breach of the peace.¹⁴² A repossession agent, hired by the secured creditor and acting as an agent of the creditor,¹⁴³ repossessed a vehicle from a public street when the driver was absent.¹⁴⁴ The repossession agent was unaware that in the backseat of the car were the debtor’s two young children.¹⁴⁵ Within a very short period of time, the agent realized the children were in the vehicle, turned around, and returned the children and the vehicle to the mother (Maria).¹⁴⁶ The court held that there was no breach of the peace because there was no objection “at, near, or incident to the seizure of property.”¹⁴⁷ Any harm done after the repossession had taken place was not considered, as the court only focused on the nature of conduct of the repossession agent’s conduct.¹⁴⁸ The court reached this decision despite the harm done to the children, Maria, and Maria’s brother, who was not the debtor but was present and was diagnosed with post-traumatic stress disorder as a result of the incident.¹⁴⁹

A South Carolina court used similar reasoning regarding the safety of third parties in *Jordan v. Citizens & Southern National Bank of South Carolina*.¹⁵⁰ After the debtor’s truck had been repossessed, the debtor

141. *Teeter Motor Co., Inc. v. First Nat’l Bank of Hot Springs*, 543 S.W.2d 938, 941 (Ark. 1976).

142. *See Chapa v. Traciers & Assocs.*, 267 S.W.3d 386 (Tex. Ct. App. 2008).

143. *Id.* at 389.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 395.

148. *Id.*

149. *Id.* at 389–90.

150. 298 S.E.2d 213, 214 (S.C. 1982).

pursued the creditor in another vehicle for up to thirty minutes.¹⁵¹ During the pursuit, the creditor “exceeded the speed limit, failed to observe traffic signals and drove recklessly.”¹⁵² Even though the safety of the public was presumably endangered by a tow truck driving recklessly, the court did not find a breach of the peace.¹⁵³ In fact, the court stated that even if the reckless driving constituted a general breach of the peace, it was irrelevant because it was not incident to the repossession of the vehicle.¹⁵⁴

These courts seem to adhere to the principle that a breach of the peace can arise solely from interactions between the debtor and creditor at the time of the repossession, such as violence, verbal confrontation, or trespass. Harm or threatened harm to third parties immediately following the repossession does not give rise to a breach of the peace.

As the preceding discussion illustrates, courts applying a fact-specific inquiry to identify a breach of the peace vary considerably in their selection and treatment of the relevant factors. This variation has led to confusion, uncertainty, and potentially dangerous situations as parties must guess at the scope of their rights in the context of self-help repossession.

C. Inconsistent Decisions of Courts Nationwide Reflect the Unpredictability Caused by the UCC, Displaying a Need for Reform

Ex post, case-by-case analysis of what constitutes a breach of the peace has produced inconsistent standards for lawful self-help repossession across jurisdictions.¹⁵⁵ This variation undermines predictability for debtors, creditors, and the public, and promotes needless litigation. While the five-factor approach provides greater predictability than the free-form, fact-specific approach, it is still inadequate in providing guidance for affected parties in advance of litigation.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *See supra* Part II.B.

i. *Courts Should Adopt a Uniform Definition of “Breach of the Peace” in Order to Provide Clarity for Debtors, Creditors, and the Public*

To dispense with the current inconsistency in the case law, courts should adopt a uniform analysis for identifying a breach of the peace in order to promote fairness, consistency, and predictability. The purpose of self-help repossession is:

(1) to benefit creditors in permitting them to realize collateral without having to resort to judicial process; (2) to benefit debtors in general by making credit available at lower costs . . . and (3) to support a public policy discouraging extrajudicial acts by citizens when those acts are fraught with the likelihood of resulting violence.¹⁵⁶

Keeping this purpose in mind, the test must emphasize all potentially violent confrontations and consider equally the rights and needs of the creditor, the debtor, and the public.

The courts should have a legal framework that allows them to consistently apply the law. Debtors and creditors should be able to understand the law surrounding breach of the peace so they are able to properly repossess property and correctly ascertain when a breach of the peace has occurred. Moreover, companies or individuals who engage in repossessions in multiple jurisdictions should not have to perform extensive legal research in order to understand the relevant standards governing their right to self-help repossession. This is completely unnecessary and contrary to the purpose of the Uniform Commercial Code.¹⁵⁷ Finally, courts across the country should not be obligated to create potentially inconsistent decisions every time a new breach of the peace issue arises. They should have a framework to use and a functional test to implement.

III. THE UCC SHOULD INCORPORATE A TWO-PART TEST INCORPORATING PER SE RULES OF EXCLUSION AND FACTORS OF CONSIDERATION TO DETERMINE WHETHER A BREACH OF THE PEACE OCCURS DURING SELF-HELP REPOSSESSION

As a remedy to the current inconsistency surrounding breach of the peace, the UCC should be amended to incorporate the following two-

156. *Williams v. Ford Motor Credit Co.*, 674 F.2d 717, 719 n.4 (8th Cir. 1982).

157. *See supra* note 60 and accompanying text.

part test for determining whether a breach of the peace occurs during self-help repossession. The first part identifies circumstances that constitute a per se breach of the peace. If the repossession at issue did not involve a per se breach, then a court should consider the factors enumerated in the second part of the test to determine whether or not a breach of the peace occurred.

A. *Under Step One, a Court Should Determine Whether the Case Involves a Per Se Breach of the Peace*

The first part of the breach test identifies three categories of conduct that constitute a per se breach: involvement of law enforcement, use of violence, and verbal altercations. If any of these categories of conduct occur during the course of self-help repossession, then there has been a breach of the peace. Adopting limited categories of conduct constituting a per se breach will provide clear guidance to parties and allow courts to determine whether a breach of the peace occurred during the preliminary phases of litigation.

i. *Use of Law Enforcement During Any Stage of the Repossession Constitutes a Per Se Breach of the Peace*

Use of law enforcement should not be permitted before, during, or after the self-help repossession under any circumstances. Under the proposed test, any use of law enforcement personnel is immediately deemed to be a breach of the peace and the repossession must end. This could be as simple as a creditor using an officer to restrain the debtor during repossession. It can also apply to the debtor or creditor calling the police for assistance during the repossession because they feel threatened. This applies to both uniformed and plain-clothes officers as well as any situation where law enforcement personnel are not used to physically repossess the collateral, but are merely present at or near the scene.

The entire purpose of self-help repossession is to allow individuals to act without first resorting to the judicial system.¹⁵⁸ Involving law enforcement personnel in any capacity is inconsistent with the concept of an extrajudicial remedy.¹⁵⁹ Moreover, prohibiting police involvement

158. See *supra* note 154 and accompanying text.

159. Even though law enforcement personnel technically are part of the executive branch and not the judicial branch, they still provide legal enforcement to what is supposed to be an extrajudicial remedy.

is consistent with UCC commentary¹⁶⁰ and case law recognizing that the use of law enforcement prevents the debtor from “exercising his right to resist by all lawful and reasonable means a non-judicial take-over.”¹⁶¹ This rule would also remedy the current inconsistency in court decisions regarding whether or not the mere presence of law enforcement personnel breaches the peace.¹⁶²

ii. *No Violence or Threats of Violence Are Permitted During Self-Help Repossession*

Any violence or threats of violence by either the debtor or the creditor should constitute a per se breach of the peace. Courts across the country have repeatedly held that violence is a breach of the peace¹⁶³ and that one of the objectives of self-help repossession is to discourage extrajudicial acts that are likely to result in violence.¹⁶⁴ The courts are very clear and consistent on this point,¹⁶⁵ which is also supported by common sense. The drafters of the UCC likely would not have wanted to create a self-help remedy that would encourage violent or dangerous behavior.¹⁶⁶

For the purpose of the breach test, physical violence encompasses any physical contact between parties or between the debtor and any instrument used by the creditor during the repossession of collateral. The obvious example involves a physical altercation between two parties or a threat by one party to physically harm the other. However, physical violence may also occur by using or threatening to use an object such as a vehicle in a physical manner.¹⁶⁷ Additionally, courts should presume violence when one individual uses his body in a physical or physically threatening manner against the property of the other party.¹⁶⁸ This

160. See *supra* note 98 and accompanying text.

161. *Stone Mach. Co. v. Kessler*, 1 Wash. App. 750, 757, 463 P.2d 651, 655 (1970).

162. See *supra* notes 110–14 and accompanying text.

163. See *supra* notes 115–17 and accompanying text.

164. See, e.g., *Williams v. Ford Motor Credit Co.*, 674 F.2d 717, 720 (8th Cir. 1982) (holding that there was no breach of the peace because the repossession was done “without any incident which might tend to provoke violence”).

165. See *supra* Part II.B.ii.

166. U.C.C. § 9-609 (2009). The drafters’ express inclusion of the requirement that lawful self-help cannot cause a “breach of the peace” evidences this intent.

167. See, e.g., *Big Three Motors, Inc. v. Rutherford*, 432 So.2d 483, 484–86 (Ala. 1983) (holding a breach of the peace occurred when the secured party’s agent blocked the debtor’s wife with his vehicle, while she was driving the secured vehicle, and then persuaded her to drive the vehicle to the dealership where it was placed “in storage” because of delinquent payments).

168. See, e.g., *State v. Trackwell*, 458 N.W.2d 181 (Neb. 1990). *Trackwell* held that a breach of

category of conduct does not encompass verbal confrontations that are unlikely to incite violence, which are addressed in the following section.

iii. *Verbal Confrontations, as Well as a Creditor's Failure to Heed a Verbal Request to Cease Repossession, Constitute a Per Se Breach of the Peace*

A creditor or repossessing agent's failure to heed the debtor's verbal request to terminate the repossession should constitute an immediate breach of the peace. Currently, courts are divided as to whether a verbal request or confrontation constitutes a breach of the peace. Some courts attempt to define the lawful limits of self-help repossession based on the intensity of the verbal request.¹⁶⁹ Other courts focus on the probability of a violent escalation following the specific verbal confrontation.¹⁷⁰

Court decisions attempting to determine the intensity of a verbal request or the likelihood of violence in a verbal confrontation cause inconsistencies, unpredictability, and confusion.¹⁷¹ Individual decisions provide little precedential value because they are limited to a specific set of facts. Meanwhile, confrontations during attempted repossessions have resulted in injuries and deaths.¹⁷² While we may think that only confrontations resulting in violence should be avoided, the reality is that when confronted, debtors, creditors, and/or repossessing agents will not always act rationally and may display rage without provocation or warning.¹⁷³ There is always a possibility that violence will result from a

the peace occurred when a collection agency owner and an employee went to the debtor's farm at 11:00 p.m., took the secured pickup truck that was loaded with the debtor's personal property, and started to pull out despite the protests of the debtor. *Id.* at 182. The protest consisted of the debtor pounding on the driver's side of the pickup and attaching herself to the side of the truck, although she dropped off near the end of the driveway. *Id.*

169. See *supra* notes 130–32 and accompanying text. Some courts have held that a debtor's verbal objection, however minor, makes any seizure a breach of the peace. Other courts require a somewhat higher level of protest, necessitating an "unequivocal oral protest" or a debtor's "clearly expressed objection."

170. See *supra* notes 133–38 and accompanying text.

171. See *supra* notes 130–32 and accompanying text.

172. Press Release, Nat'l Consumer Law Ctr., Repo Madness Threatens Consumers (Mar. 11, 2010), available at <http://www.prnewswire.com/news-releases/repo-madness-threatens-consumers-87338337.html> ("Pistols, rifles, shotguns, knives, fists and automobiles are frequently wielded as weapons in confrontations arising out of self-help repossessions. Since Jan. 1, 2007, those confrontations have resulted in at least six deaths, dozens of injuries and arrests and uncounted traumas.").

173. See, e.g., *Kouba v. E. Joliet Bank*, 481 N.E.2d 325, 327 (Ill. Ct. App. 1985). A verbal confrontation occurred during a repossession, after which the unprovoked agent grabbed one of the debtors, threw her to the ground by her neck, and took the vehicle by force. *Id.*

confrontation, especially when a stranger is in the debtor's driveway repossessing his or her car. There must be a bright-line rule to promote consistency and avoid violence. Therefore, under the proposed test, any verbal request or confrontation by the debtor intended to terminate the repossession is a breach of the peace and the repossession must immediately stop. This applies to a hypothetical situation where the debtor says, "Hey, that's my car!" or "Stop!" This rule may seem harsh in its restriction on the lawful scope of self-help repossession, but it is necessary to create clarity and reduce the risk of unnecessary violence.

Consent to repossession should also be revocable by the debtor at any time as another measure to avoid a potentially violent confrontation. After consent is revoked, any physical attempt to repossess property should automatically constitute a breach of the peace. Revocation of consent itself is not a breach of the peace because the debtor should also have the ability to re-invoke his consent if he wishes. If the debtors initially choose to consent to the repossession of their property and then for any reason decide that they no longer want to allow the repossession to take place, they should have the right to do so.

B. If the Case Does Not Involve a Per Se Breach of the Peace, Then Courts Should Consider Two Additional Factors to Determine Whether a Breach Occurred

The second part of the breach test requires equal consideration of two factors: (1) the degree of trespass and (2) the disturbance to third parties. If none of the per se exclusionary rules apply, and neither of these two factors under the second part of the test leads to the conclusion that a breach occurred, then the court should find that the creditor properly performed the self-help repossession.

i. The Degree of Trespass Necessary for Repossession Is Important in Determining Breach of the Peace

Courts currently struggle in their treatment of trespass as a factor in determining whether a breach of the peace occurred.¹⁷⁴ In order to properly weigh the rights of the debtor and creditor, the courts should not treat all trespass as an automatic breach of the peace. The fact that trespass arises in many repossessions—because people often keep their property on the premises of their home or business—further complicates

174. See *supra* Part II.B.iii.

the issue.¹⁷⁵ Nevertheless, courts should focus on the probability of confrontation, discouraging repossessions that have a greater likelihood of violence. To that end, courts should analyze: (1) the distance between the site of the repossession and the debtor's household, and (2) the extent to which the debtor has affirmatively protected the property.

The first aspect of the trespass analysis is the distance from the debtor's household or business. The general rule should be that a repossession occurring farther from the debtor's household or business is less likely to constitute a breach of the peace.¹⁷⁶ Entering a debtor's home to repossess collateral is contrary to the sacredness of the home, potentially very dangerous, and should almost always constitute a breach of the peace.¹⁷⁷ On the other end of the spectrum, repossessing collateral from the debtor's driveway involves little trespass to private property and should not by itself constitute a breach.¹⁷⁸ Given the diversity of potential locations for repossession, courts must consider this on a case-by-case basis, with the guiding principle that greater distance from the debtor's residence or business makes it less likely that there was a breach of the peace.

The second aspect of the trespass analysis is the extent to which the debtor has affirmatively protected the property the creditor seeks to repossess. The general rule should be that the greater the protections of the property used by the debtor, the more likely that a breach of the peace has occurred. For example, courts should discourage anyone from breaking locks or cutting chains to reach collateral, making those actions a breach of the peace.¹⁷⁹ However, courts should not consider it a breach

175. See *supra* Part II.B.iii.

176. See WHITE, *supra* note 91, at 577.

177. See, e.g., *Evers-Jordan Furniture Co. v. Hartzog*, 187 So. 491, 493 (Ala. 1939) ("The law guards with jealous care the sacredness of every man's dwelling . . ."); *Girard v. Anderson*, 257 N.W. 400, 402–03 (Iowa 1934) (Repossession of a piano through an unlocked door of a debtor's residence was found to be a breach of the peace even though the door was supposedly unlocked).

178. See, e.g., *Butler v. Ford Motor Credit Co.*, 829 F.2d 568, 568 (5th Cir. 1987) (holding that a secured creditor making unauthorized entry onto driveway of debtor's residence to remove vehicle is not breach of the peace); *Hester v. Bandy*, 627 So.2d 833, 840 (Miss. 1993) ("[S]imply going upon the private driveway of the debtor and taking possession of secured collateral, without more, does not constitute a breach of the peace."); *Ragde v. Peoples Bank*, 53 Wash. App. 173, 176–77, 767 P.2d 949, 951 (1989) (holding that repossession of car from driveway at 5:00 a.m. was not breach of the peace).

179. See, e.g., *Martin v. Dorn Equip.*, 821 P.2d 1025, 1026–28 (Mont. 1991) (cutting chains connected to a lock is breach of the peace); *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 859, 862 (Okla. 1998) (cutting gate's chain without permission is a breach of the peace); *Davenport v. Chrysler Credit Corp.*, 818 S.W.2d 23, 26, 29–30 (Tenn. Ct. App. 1991) (entering garage and cutting chains that attached car to post in garage to repossess the car is a breach of the peace).

of the peace to disregard a “No Trespassing” sign, because the sign does not provide any protection beyond letting the world know of the debtor’s desire to keep unwelcome visitors off of their property.¹⁸⁰ Regardless of the specific facts, courts should use the guiding principle that bypassing greater levels of protection increases the likelihood that a breach of the peace occurred.

ii. *Harm to Third Parties Can Cause a Breach of the Peace and Should be Considered Accordingly*

Even though courts consistently hold that a disturbance to third parties is irrelevant to determining a breach,¹⁸¹ this is a factor that should be taken into consideration. The UCC drafters’ concern with avoiding violence is disserved by a standard that wholly omits an entire category of confrontations from “breach of the peace” analysis. A court should first consider whether there was a confrontation with a third party that had the potential to incite violence. For example, if the debtor’s friend or relative threatens violence or performs a violent act when the creditor is attempting to repossess property, a court should find a breach of the peace. Courts should take this seriously and discourage repossessions when there is the possibility of inciting violent actions from another party. Preventing violent encounters is the goal in so many breach of the peace cases¹⁸² and there is no reason this should not extend to third parties, as well as the debtor and creditor.

Next, courts should consider whether the repossession caused an adverse impact to the person or property of third parties. The *Chapa* case exemplifies the irrationality of omitting harm to third parties from breach of the peace analysis.¹⁸³ In that case, the court determined that there was not a breach of the peace even though the repossession agent unknowingly towed the debtor’s vehicle with her two children still in the back seat.¹⁸⁴ This case creates a dangerous precedent and potential for detrimental harm to innocent parties. It also shows that courts should consider the harm done to third parties in a manner similar to the harm done to debtors and creditors. By treating third parties differently, courts

180. See, e.g., *In re Gerber*, 51 B.R. 526, 528 (Bankr. D. Neb. 1985); *Chrysler Fin. Co. v. Flynn*, 88 S.W.3d 142, 147–52 (Mo. Ct. App. 2002).

181. See, e.g., *Chapa v. Traciers & Assocs.*, 267 S.W.3d 386 (Tex. Ct. App. 2008).

182. See, e.g., *Ford Motor Credit Co. v. Herring*, 589 S.W.2d 584, 586 (Ark. 1979); *McCall v. Owens*, 820 S.W.2d 748, 751 (Tenn. Ct. App. 1991).

183. See *Chapa*, 267 S.W.3d at 388–90.

184. *Id.* at 389.

provide no relief to a mother who realized that her car was gone with her children still inside and the uncle who is now suffering from post-traumatic stress disorder as a result.¹⁸⁵ Therefore, courts should hold that any conduct by the creditor that would constitute a breach of the peace if perpetrated against the debtor, should likewise constitute a breach of the peace if perpetrated against a third party during or immediately after the repossession.

CONCLUSION

The UCC's failure to define "breach of the peace" has produced considerable uncertainty and inconsistency in the scope of lawful self-help repossession. In order to remedy this situation, the UCC should incorporate the proposed two-part test that coherently defines "breach of the peace" in a manner that balances the interests of the debtor, creditor, and public at large. This two-part test first identifies three categories of conduct that constitute a per se breach of the peace. A breach of the peace necessarily occurs if: (1) there is any use of law enforcement during the repossession; (2) there is any violence or threat of violence; or (3) there is any unheeded verbal request to cease the repossession. If none of the per se rules have been violated, then courts should proceed to the second part of the test, which requires consideration of the degree of trespass involved and any impact on third parties. This test will create greater consistency and predictability for debtors and creditors, and ensure a safer environment for the public.

185. *Id.*